In the
Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-781

FRITZ SCHERK,

Petitioner,

vs.

ALBERTO-CULVER COMPANY,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF RESPONDENT ALBERTO-CULVER COMPANY IN OPPOSITION TO MOTION OF THE AMERICAN ARBITRATION ASSOCIATION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

The Respondent, Alberto-Culver Company, objects to the motion of the American Arbitration Association ("AAA") which requests leave to file an *amicus curiae* brief in support of the Petitioner, Fritz Scherk.

This case is based upon fraudulent acts *committed within the United States* by a foreign national, Fritz Scherk, in a sale of securities to a United States citizen, Alberto-Culver Company, in violation of Section 10b of the Securities Exchange Act of 1934 ("Exchange Act"), and the relief sought is recission of the sale. The agreement of sale expressly provided that "the laws of the State of Illinois, U.S.A., shall apply to and govern this agreement . . ." The sale occurred in 1969, prior to the adoption by Congress of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("Convention"). Five months after the Respondent filed its suit in the U.S. District Court, Scherk commenced proceedings for arbitration of the controversy before the International Chamber of Commerce ("ICC"). As does Scherk, the AAA contends that the violations of the Exchange Act must be arbitrated before the ICC.

Under Rule 42(3) of this Court, the AAA is required to "set forth facts or questions of law that have not been, or reasons for believing that they will not adequately be presented by the parties . . ." The AAA makes no pretense of complying with that requirement. Its motion and proposed *amicus* brief reiterate the contentions of the Petitioner, Scherk, in this Court and in the Courts below.

Rule 42(3) requires AAA to "state the nature of the applicant's interest". The AAA disclaims self-interest by pointing out that "the controversy is to be administered not by the AAA but rather by . . . the . . . ICC". (AAA Br. p. 6) The AAA does not mention that it is linked in reciprocal agreements with the ICC and other similar private organizations. (See "Joint Clause ICC-AAA", Rules of Conciliation and Arbitration of the International Chamber of Commerce (1955) p. 4) While

the AAA professes disinterest, we respectfully suggest that it does have interest in limiting the areas in which the Federal courts have "exclusive jurisdiction".

The AAA recognizes that under the express language of the Convention certain controversies are within the "exclusive jurisdiction" of the Courts and are *not* arbitrable. Its brief states:

> "Were there a statute, for instance, which in so many words prohibited the submission to arbitration of a particular question or subject, the Convention would manifestly *not* be applicable."
> (AAA Br. p. 11; emphasis added)

The AAA brief, however, then goes on to state that "in the present case" there is "no such statute" and that the Exchange Act is only "peripherally involved". (AAA Br. p. 11) The Exchange Act violations committed within the United States are the very core of the issue which is involved in this proceeding. Thus, the AAA's entire position is founded on an incorrect assumption and is in fundamental error.

The *amicus* brief does not address itself to Section 27 of the Exchange Act which confers "exclusive jurisdiction" on the Federal District Court for violations of said Act:

> "The district courts of the United States . . . shall have *exclusive jurisdiction* of violations of this title or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this title or the rules and regulations thereunder." (emphasis added)

Nor does the AAA even mention Section 29(a) of the Exchange Act which renders "void" and unenforceable "*any*" agreement by "*any* person" which purports to evade such mandate of exclusive jurisdiction.

The decision in *Wilko* v. *Swan*, 346 U.S. 427 (1953), addressed itself to this precise subject and held that any provision in an agreement which attempts to require arbitration of future disputes is not enforceable as to disputes arising under the securities laws because such disputes are within the exclusive jurisdiction of the courts.

The AAA really contends that the underlying policy of the Convention requires that the Convention be construed as overriding the unambigous provisions of the Exchange Act as well as *Wilko* v. *Swan* and the many decisions since which have applied its doctrine to litigants of all types. Contrary to the assertion of the AAA, the language of the Convention itself confirms and recognizes that an agreement to arbitrate will not be enforced if it is contrary to a statute or public policy.[1]

And in a recent article analyzing the Convention, Mr. Aksen, the General Counsel of the AAA, whose name ap-

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[1] The Convention expressly provides a variety of circumstances which will cause agreements to arbitrate to be unenforceable:

> Where the arbitration concerns "a subject matter [not] capable of settlement by arbitration". [Article II, para. 1; Article V, para. 2(a)]
>
> Where the "agreement is null and void, inoperative or incapable of being performed". [Article II, para. 3]
>
> Where it is "contrary to the public policy of that country." [Article V, para. 2(b)]
>
> Where "the said agreement is not valid under the law to which the parties have subjected it". [Article V, para. 1(a)]

The plain and unambiguous meaning of the foregoing, and in particular the reference to "void" which is the same term used in Section 29(a) of the Exchange Act, is that these provisions recognize, adopt and give effect to the Exchange Act and to the pronouncements in *Wilko* v. *Swan*.

pears as author of the *amicus* brief, acknowledged that the Convention does not "require" arbitration of violations of the securities laws, contrary to the position taken in Point I of the *amicus* brief:[2]

> ". . . questions concerning the legality of the Securities Act (footnote to *Wilko* v. *Swan*) and validity of patents and questions of anti-trust violations have been held to be non-arbitrable because they are against public policy. *The language in the Convention would seem to indicate that American courts have the discretion to refuse enforcement to foreign awards dealing with these subjects.* Whether these limitations will be carried over to arbitration agreements and awards rendered under the Convention is a prime matter for future judicial concern. (3 SW.U.L. Rev. at p. 13; emphasis added)
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> . . . since arbitrability is left to the host country court, and *since award enforcement may be refused on the broad grounds of public policy,* it is entirely possible that each country will apply its own standards of local law rather than international ones." (3 SW.U.L. Rev. at p. 20; emphasis added)

The AAA brief asserts that the affirmance of the decision below "would impair the ability of American businessmen to freely negotiate and bargain" or preclude them from resolution of commercial disputes by arbitration. We respectfully suggest that the affirmation of the explicit and special exclusion mandated by Sections 27 and 29(a) of the Exchange Act will no more inhibit international commerce or the use of arbitration than did the adoption of the Exchange Act and the rendition of the de-

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[2] Aksen, *American Arbitration Accession Arrives in the Age of Aquarius: United States Implements United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards,* 3 SW.U.L. Rev. 1, 13, 20 (1971).

cision in *Wilko* v. *Swan* and the many cases which have applied the Exchange Act to a very broad spectrum of situations. Arbitration has burgeoned and flourished in such atmosphere, as the AAA brief clearly implies.

For the foregoing reasons, Respondent, Alberto-Culver Company, respectfully requests that the motion of the AAA for leave to file an *amicus curiae* brief be denied.

Respectfully submitted,

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